No. 26 and No. 30

Supreme Court of the United States

OCTOBER TERM, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER WHITNEY NATIONAL BANK IN JEFFERSON PARISH

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October 30, 1964.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases—Continued Page

Statutes and Regulations:

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Aside from the questions concerning jurisdiction and standing, this case presents two essentially simple issues. First, did Congress intend that the pattern of regulation devised by it to regulate branches of

national banks should be applied to bank holding company subsidiaries in any circumstances, or did Congress consider that the quite separate system of regulation it has fashioned to regulate bank holding companies would be sufficient for that purpose? Secondly, may a state, consistently with the Supremacy Clause of the Constitution, interfere with and prohibit the establishment by the appropriate federal officials of a national bank because of state objections to the ownership of the bank's stock?[1]

In this reply brief we shall attempt to restore some focus to these two questions.

ARGUMENT

I

Congress Intended the Branch Banking Law to Regulate Bank Branches and the Bank Holding Company Act to Regulate Bank Holding Companies.

Respondents argue that Whitney-Jefferson is a "branch" because the Whitney Holding Corporation was established to obtain as many of the advantages of branching as could legally be had. Petitioners' answer is that bank holding companies have been formed for this purpose for many years and that Congress, fully aware of that fact, has deliberately decided not to subject any or all bank holding companies to the branch banking law.

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[1] Respondents' attempt to introduce another issue, involving the antitrust laws, into the case buttresses petitioners' contention that the litigation is an impermissible collateral attack on a decision of the Federal Reserve Board. See R. 104-06 and 12 U.S.C. § 1842(e).

A. THE WHITNEY HOLDING CORPORATION IS A TYPICAL BANK HOLDING COMPANY NOT CALLING FOR ANY EXCEPTION TO THE GENERAL STATUTORY PATTERN.

Respondents appear to concede, as they must, that as a general matter national banks owned by bank holding companies are not subject to the branch banking law, 12 U.S.C. §36(c), but rather to the quite different system of regulation contained in the "holding company affiliate" provisions of the Banking Act of 1933 and in the Federal Bank Holding Company Act of 1956. (See Brief for Respondent Banks, pages 63-64, 73; Brief for Respondent, State Bank Commissioner, pages 13, 15.)

This concession, once its implications are understood, concedes away respondents' entire case. Since many bank holding companies have for decades owned banks in states which prohibit or limit branch banking (R. 339-42), respondents are conceding that notwithstanding such state law two or more banks can be owned by the same holding company—which, of course, can and almost invariably does exercise control, as an incident of ownership, over its subsidiaries. What is it, then, that makes Whitney different?

Respondents claim that every bank holding company other than Whitney was organized for purposes of "investment," while Whitney was organized to evade the branch banking law.[2] Respondents' picture of the usual bank holding company as a mere aggregation of coupon clippers, who acquire and hold bank stock without any conception of the possibilities of multiple-office banking, is a drastic distortion of the part holding companies have played in American

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[2] See, *e.g.*, Brief for Respondent Banks, page 63.

banking. This is fully demonstrated in our main brief; see particularly pages 16-20, 24, and 76-79.

The fact is that bank holding companies identical in purpose and substance with Whitney have been a familiar element on the American banking scene for decades. Congress has meticulously considered how this phenomenon should be regulated, and has repeatedly heard the views of those who argue that holding company banking is so close to branch banking as to warrant subjecting it to the same type of regulation.[3] But Congress rejected those views in 1933, when it did not restrict the locations of bank holding company subsidiaries, and again in 1956, when the Senate eliminated from the Federal Bank Holding Company Act a provision, contained in the bill as passed by the House, that would have subjected bank holding companies to the same limitations on location as those applied to bank branches.[4] So respondents were compelled to look farther afield for grounds for arguing that Whitney was not the ideal bank holding company that Congress had in mind.[5]

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[3] Respondent Banks quote some of these views at pages 74-75 of their brief What respondents fail to mention, of course, is that these statements were made in support of regulatory proposals that Congress *rejected*.

[4] See our main brief, pages 23-27.

[5] In their search for some feature that would differentiate Whitney from the usual bank holding company, respondents resurrect an argument they last made in the District Court, that the capitalization of Whitney Holding Corporation by Whitney-New Orleans violated the "upstream financing" provision of the Federal Bank Holding Company Act, 12 U.S.C. § 1845(a)(1), which forbids a bank to "invest any of its funds in the capital stock . . . of a bank holding company of which it is a subsidiary" (Brief for Respondent Banks, pages 58-59). The short answer is that at the time of the

Finally the Court of Appeals was induced to introduce a factual issue into the case. It held, without support in the record, that an intent had existed to operate Whitney-Jefferson in some unspecified unusual manner. Petitioner immediately called "foul," protesting in its petition for rehearing that "on the view of the facts and the law taken by the panel of this court the case was not ripe for summary judgment."[6] Respondents nevertheless assert, apparently seriously, that "Whitney . . . now contends

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so-called "upstream" financing Whitney Holding Corporation was not a "bank holding company" and Whitney-New Orleans was not a "subsidiary" of a bank holding company within the definitions of the Act, 12 U.S.C. §§ 1841(a) and (d). Section 1845(a)(1) does not, of course, prohibit the payment of dividends by a bank to a holding company which owns its stock, and does not restrict the use of such dividends when received. Moreover, respondents' argument is not properly presented in this litigation, since administration of the Bank Holding Company Act is vested in the Federal Reserve Board (12 U.S.C. § 1844), and the Board's approval of the financing in question can be challenged through the judicial review provided for in 12 U.S.C. § 1848.

Respondent banks also claim that Whitney is "different" because in approving the Whitney program the Federal Reserve Board recognized that Whitney-Jefferson and Whitney-New Orleans would be under common control and that the "financial history and condition, character of management, and prospects" of Whitney-New Orleans were relevant in evaluating the new bank (Brief for Respondent Banks, pages 25-26). But the Federal Bank Holding Company Act, 12 U.S.C. § 1842(c), directs the Board in passing on an application to consider, among other factors, the financial history and condition, prospects and character of management "of the company or companies and the *banks* concerned," that is, all the banks which would be members of the proposed holding company system.

[6] Headnote 2, pages 10-13, of the petition for rehearing, a copy of which has been lodged with the Clerk of this Court.

for the very first time before this Court, that it was inappropriate for the Court of Appeals to decide such a question on summary judgment" (Brief for Respondent Banks, page 64).[7] In our opinion this issue is immaterial, but if the Court believes otherwise then clearly a trial must be had on it.

With unshaken confidence in the wholly unestablished "intent" to operate Whitney-Jefferson in some impossible, but nevertheless reprehensible, manner, respondents rely upon it to warrant "piercing the corporate veil," or veils, between the Whitney Holding Corporation and the two banks, which Congress has so clearly authorized and the Federal Reserve Board has approved after such painstaking and thorough examination. Plainly the District Court was not the forum in which to attack the Federal Reserve Board on this question of fact. Moreover, Congress has long since removed the only ground for looking through the corporate structure stated in any of the cases cited by respondents that concern banks. In *Metropolitan Holding Co.* v. *Snyder*, 79 F. 2d 263 (8th Cir. 1935), and *Corker* v. *Soper*, 53 F. 2d 190 (5th Cir. 1931), *cert. denied*, 285 U.S. 540, it was held that, upon the insolvency of a bank whose stock was owned by a bank holding company without significant other assets, the double liability attaching to the bank stock could be invoked against the ultimate owners, the shareholders of the holding company. Respondents fail to mention *Anderson* v. *Abbott*, 321 U.S. 349, in which this Court reached a similar result.

These cases arose at a time (1927-32) when bank holding companies were subject to no federal regulation whatever. The courts held that if the shareholders

[7] Italics in original.

of the holding companies were not treated as the ultimate or real owners of the bank stock, the federal policy of double liability would be frustrated. As this Court observed in *Anderson* v. *Abbott*, 321 U.S. at 364-65, Congress subsequently enacted, as part of the Banking Act of 1933, provisions insuring the financial responsibility of bank holding companies. This Court recognized, *ibid.*, that if these provisions had been in force at the time of the bank failures, "piercing the corporate veil" would have been unnecessary.

Respondents also rely on an opinion given in 1911 by Solicitor General Lehmann, opposing the legality of a plan by which a New York bank set up an affiliated company whose stock was tied to that of the bank; this "affiliate" then proceeded to buy up stock both in other banks and in nonbanking corporations. The Solicitor General's opinion (reproduced at pages 3-32 of the Supplemental Appendix to Brief for Respondents) was rendered long before Congress enacted any legislation regulating bank holding companies. The Solicitor General's principal objection to the affiliate in question was that it held both bank stock and stock in nonbanking enterprises (Supplemental Appendix, *supra*, page 32); he was also concerned that its unregulated expansion created the danger of undue centralization and impairment of competition. Neither of these objections can apply to any bank holding company since the enactment of the 1956 Act, which forbids such companies to own stock in "any company which is not a bank" (12 U.S.C. § 1843) and requires that any proposed expansion of the system be approved in advance by the Federal Reserve Board, which is directed to consider any threat to "the preservation of competition in the field of banking" (12 U.S.C. § 1842(c)).

Respondent Banks allege (pages 72-73 of their brief) that in debating the Banking Act of 1933 members of Congress described the "Whitney-type 'holding company device'" as "this Frankenstein in banking," "vicious," and "mainly responsible for the depression." Actually these terms were used in reference not to bank holding companies but rather to "securities affiliates," that is, companies with the same stockholders as banks and closely tied to such banks, which engaged in the business of underwriting and trading in corporate securities. The problem of how to regulate these "securities affiliates" was one with which Congress was greatly concerned, and it was in that connection, *not* in connection with bank holding companies, that Senator Glass cited the Solicitor General's opinion of 1911.[8] Congress solved this problem by flatly prohibiting banks from engaging in the securities business either directly or through affiliates. Sections 20, 21, Banking Act of 1933, 12 U.S.C. §§ 377, 378 (1958), as amended, 12 U.S.C. § 378 (Supp. V, 1959-63). The question of branch, chain and group banking, which was considered "another question altogether,"[9] was also exhaustively studied. Every one concerned understood that branch banking and holding company banking were two different things, though there was much discussion as to their respective merits and how they should be regulated.[10] It was recognized

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[8] See 77 Cong. Rec. 3725-26 (1933); 76 Cong. Rec. 1994, 2000 (1933); 75 Cong. Rec. 9887-99, 9909-13 (1932); Hearings Before a Subcommittee of the Senate Committee on Banking and Currency Pursuant to S. Res. 71, 71st Cong., 3rd Sess. 20-23, 39-41, 116-17, 216, 231-38, 298-309, 338-42 (1931).

[9] *Hearings*, n. 8 *supra*, at 303.

[10] See *id.* at 8-9, 14-18, 119, 216, 220-24, 245-48, 263-64, 314-17, 324, 348, 576, 578, 582, 627 (1931).

that holding company banking was used "in part as a substitute where branch banking is not permitted . . . ."[11] Nevertheless, Congress' decision in 1933 was to regulate the two types of banking differently and not to impose any restrictions on the locations of bank holding company subsidiaries. Thus the legislative history of the Banking Act of 1933, like that of the Federal Bank Holding Company Act of 1956, is conclusive as to the issue here.

B. WHETHER WHITNEY-JEFFERSON IS A "BRANCH" IS A QUESTION OF FEDERAL, NOT STATE, LAW

Respondents and *amici curiae* contend that the Comptroller was required to deny a certificate to Whitney-Jefferson because of a claimed congressional "policy of equalization" between state and national banks. Respondents' argument is in substance that the Comptroller should have denied Whitney-Jefferson a certificate to open for business as a new bank because, if a Louisiana bank owned by a bank holding company had sought such permission, the State Bank Commissioner would have denied it on the ground that the new bank would in his opinion be a "branch." According to respondents, then: (1) Section 36(c) incorporates state law not only as to the location of branches, but also as to the definition of what a "branch" is; and (2), despite the express language of Section 36(c), that section incorporates not only the "statute law" of the states but also administrative decisions made by the state banking authorities. It is said that these conclusions are required in order to carry out the alleged congressional "policy of equalization."

The fact, however, is that Congress has never

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[11] *Id.* at 315-16.

adopted any general "policy of equalization" which makes the powers and characteristics of national banks vary from state to state depending on the powers and characteristics of the fifty state banking systems. To the contrary, the National Bank Act of 1863 was designed to establish a uniform system throughout the country which would not be subject to every vagary of state law or regulation.[12] Congress has, indeed, chosen to incorporate certain aspects of state law into the federal banking law. But, except in the specific instances where Congress has done so, the powers and characteristics of national banks are determined not by the law of the state in which they are located, but by the National Bank Act. The "policy of equalization" governs where Congress has directed it to govern, and not otherwise.[13]

One of the respects in which Congress has incorporated state law is that a national bank may establish a branch only at a location where the statute law of the

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[12] See Cook County Nat'l Bank v. United States, 107 U.S. 445, 448; Easton v. Iowa, 188 U.S. 220; First Nat'l Bank v. California, 262 U.S. 366; First Nat'l Bank v. Drexler, 184 So. 607 (La. App. 1938).

[13] See pages 29-30 and 45 of our main brief for examples of situations where federal law governs the powers of national banks regardless of state law. "Equalization" does not even apply throughout the branching area. For example, Congress has provided for the operation by national banks of banking facilities at military installations, regardless of whether state banks could establish branches there. Texas *ex rel.* Falkner v. Nat'l Bank of Commerce, 290 F. 2d 229 (5th Cir. 1961). It has recently been held that 12 U.S.C. § 36(c)(1) permits branching within a single city by national banks in circumstances where a state bank could not establish branches. Walker Bank and Trust Co. v. Saxon, (D. Utah, Sept. 30, 1964, 33 U.S.L. Week 2179 (1964).

state in which it operates would permit a state branch to establish a branch (12 U.S.C. § 36(c)). But the definition of the term "branch" is purely a matter of federal law (12 U.S.C. § 36(f)) and it is plain that by that term Congress meant an additional office of the same national banking association, not a separately chartered bank. Louisiana cannot, by defining as "branches" things which are not branches under federal law, unilaterally enlarge the scope within which its law is made applicable by Section 36(c).[14]

Startling consequences would result if respondents' theory were accepted. For example, if Louisiana considered one state bank a "branch" of another merely because the two banks had one common shareholder owning one per cent of the stock, the Comptroller would be required to deny an application to establish a new national bank if the same degree of common ownership existed. Similarly, if Louisiana took the position that a state bank established a new "branch" every time it expanded to another floor of the same office building, the Comptroller would be bound by the same restriction. Respondents' theory is in direct conflict with the National Bank Act and with the entire philosophy behind the national banking system.

Moreover, respondents point to nothing in the statute or decisional law of Louisiana which would make ownership of two state banks by the same bank holding

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[14] The lower courts in the present case never intimated that state law was relevant on this point. In Camden Trust Co. v. Gidney, 301 F. 2d 521, 525, 526 (D.C. Cir. 1962), *cert. denied*, 369 U.S. 886, an argument identical to that now made by respondents was rejected without comment. Substantially the same theory was squarely rejected by a state court in Rushton *ex rel.* Comm'r of Banking Dep't v. Michigan Nat'l Bank, 298 Mich. 417, 299 N.W. 129, 136 (1941).

company a violation of the state branch banking law.[15] Respondents rely on an unauthoritative[16] opinion of the Attorney General of Louisiana which alleged that holding company banking across parish lines is "prohibited, if not by the letter, by the spirit of our law" (R. 163). Respondents principally rely, however, on the fact that, if a bank holding company applied to the State Banking Commissioner of Louisiana for authority to establish a state bank in circumstances analogous to the Whitney holding program, the Commissioner would deny the application. But that fact does not bind the Comptroller, because (1) there is no incorporation of state law in the provisions for the establishment of new banks, 12 U.S.C. §§ 21-27, under which Whitney-Jefferson sought its charter; (2) Section 36(c) incorporates state law only with respect to the locations of what federal law defines as branches; and (3) only state statute law, not the views of state banking officials, is incorporated.

If the Comptroller were bound to follow, not only state statute law, but also the discretionary decisions of state officials, he would have to refer every application for a new branch to the bank commissioner of the state in question for his binding decision as to whether he would grant it if the applicant were a state bank. If respondents' views were accepted, the Comptroller would also have to refer every application for

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[15] The Federal Reserve Board correctly concluded, R. 104, that Louisiana law did not prohibit the Whitney program.

[16] See King v. Order of United Commercial Travelers, 333 U.S. 153, 161; Mogis v. Lyman-Rickey Sand and Gravel Corp., 189 F. 2d 130, 140 (8th Cir. 1951), *cert. denied*, 342 U.S. 877; Labit v. Terrebonne Parish School B'd, 49 So. 2d 431, 434 (La. App. 1950); State *ex rel.* Singelmann v. Morrison, 57 So. 2d 238, 247 (La. App. 1952).

the chartering of a new bank to the state bank commissioner for his binding decision as to whether he would consider it a "branch" of some other bank. Such a requirement would wholly undermine the autonomy of the Comptroller's office and of the entire national banking system.

II

A STATE MAY NOT PROHIBIT THE CHARTERING AND OPENING OF A NATIONAL BANK

The Louisiana statute here in question attempts to prohibit the Comptroller from chartering a national bank, and the bank from doing a banking business, even though the bank has met all the qualifications laid down in federal law. The Louisiana statute presents a plain conflict between state law and valid federal law, and therefore may not stand.

A. THE FEDERAL BANK HOLDING COMPANY ACT DID NOT GIVE THE STATES THE POWER ASSERTED HERE

Respondents attempt to sustain the statute by relying on Section 7 of the Federal Bank Holding Company Act of 1956, 12 U.S.C. § 1846. Petitioners showed in their main briefs (Brief for Petitioner Saxon, pages 72-74; Brief for Whitney-Jefferson, pages 46-51) that both the language of this section and its legislative history demonstrate that it cannot be read as a grant of any power to the states, but merely as an expression of Congress' intention not to preempt the field of *bank holding company* regulation. The states may regulate bank holding companies so long as their regulation does not infringe some constitutional or federal statutory provision. The issue is whether the

particular means chosen by Louisiana—the attempt to prohibit a national bank from doing business because it is owned by a bank holding company—is in conflict, not with the Federal Bank Holding Company Act, but with the National Bank Act. While the Holding Company Act did not preempt the field of bank holding company regulation, the National Bank Act did preempt the field of the establishment and chartering of national banks and the setting of conditions on their right to do a banking business.

Respondents cite language as part of the legislative history of the Federal Bank Holding Company Act that in fact described provisions of the House version of the bill which the Senate later rejected. Section 7 as enacted merely reserves to the states the right to enact otherwise legal and constitutional measures regulating bank holding companies. It does not reserve to the states, since they never had it, the right to enact illegal and unconstitutional measures: for example, Louisiana could not confiscate all assets of bank holding companies within its borders, though that would surely discourage such companies from operating in the state. Whatever legislation Louisiana might validly enact regulating the stock ownership of Whitney-Jefferson, Louisiana may not compel a national bank to close its doors or prevent it from opening them.

Respondents rely heavily on Senator Robertson's statement that Section 7 would preserve to the states the right to enact such legislation as Georgia had already put into effect. But the Georgia statute, like those involved in the Illinois and New Hampshire cases discussed in our main brief (at pages 48-49), operates only on bank holding companies, and contains

no provision similar to Louisiana's attempt to prevent a national bank from opening.[17] It is therefore without relevance here.

Respondents also rely on Section 3(d) of the Federal Bank Holding Company Act, the present 12 U.S.C. § 1842(d). This section provides that the Federal Reserve Board shall not approve an application of a bank holding company incorporated in one state to acquire the stock of a bank in another state unless the statutory law of the latter state specifically authorizes such an acquisition. By its terms, of course, the section is not applicable here, and Congress expressly rejected an attempt to make it applicable to bank holding companies operating, like Whitney, entirely within the borders of a single state. (See our main brief, pages 23-27.)[18]

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[17] The Georgia statute is set out at R. 416-19.

[18] In the bill as introduced into the House of Representatives and as reported by the House Committee, the section corresponding to the present Section 3(d) made state law a yardstick not only as to bank holding companies operating across state lines, but also as to such companies operating within a single state. H. R. Rep. No. 609, 84th Cong., 1st Sess. 24 (1955). The Senate Committee deleted the entire section from the bill. S. Rep. No. 1095, 84th Cong., 1st Sess., pt. 1, at 11 (1955). The present Section 3(d) originated as an amendment offered on the floor of the Senate by Senator Douglas. He did not seek to restore the entire broad provision of the House bill, but only that part which dealt with bank holding companies that operated across state lines. It was the "great banking empires across state lines," not the smaller, single-state bank holding companies, which Congress considered dangerous and wished to curb. 102 Cong. Rec. 6857-59, 6862 (1956). Congress is thus specifically on record as repudiating the broad interpretation which the respondents give to Section 3(d) as applying, in some attenuated sense, outside the area expressly covered by its language.

Section 3(d) was enacted because Congress feared that the states lacked sufficient jurisdiction to control interstate bank holding companies to the same extent to which they could control holding companies subject to their jurisdiction. Congress' direction was to the Federal Reserve Board, and does not mean that a state might constitutionally provide for the closing of a national bank if, contrary to Section 3(d), stock in the bank had been acquired by a foreign bank holding company. It is regulation of bank holding companies, not of national banks, which Congress has permitted the states to undertake. This is what both Section 3(d) and Section 7 illustrate. Neither section permits the states, in any circumstances, to close down national banks or to prevent them from opening. Indeed, if a state could prevent a national bank within its borders from operating because of disapproval of the ownership of its stock, Section 3(d) would have been wholly unnecessary, since the states could have excluded interstate bank holding companies by that means.

B. RESPONDENTS' ARGUMENT THAT WHITNEY-JEFFERSON NEVER BECAME A NATIONAL BANK IS BOTH INACCURATE AND IRRELEVANT.

Respondents further contend that Whitney-Jefferson is not entitled to protection as a federal instrumentality because it was not a national banking association when the Louisiana statute was enacted on July 10, 1962. Respondents contend that on that date Whitney-Jefferson was a "mere 'body corporate,'" not a "national bank" (Brief for Respondent Banks, page 31; see also *id.* at 82-83, and Brief for Respondent Louisiana State Bank Commissioner, pages 29-30).

This is plain error; 12 U.S.C. § 24 expressly provides that:

> "Upon duly making and filing articles of association and an organization certificate, a *national banking association* shall become, as from the date of the execution of its organization certificate, a body corporate . . . ." (Italics added.)

Whitney-Jefferson filed its articles of association and its organization certificate on May 10, 1962 (R. 390). It became both a body corporate and a national banking association on that date, and was recognized as such by the Deputy Comptroller of the Currency by letter dated May 11, 1962 (R. 392-94). The further certificate required by 12 U.S.C. § 27 does not create a national banking association, but rather permits the association already in existence to commence a banking business. See *Wallace* v. *Hood*, 89 Fed. 11, 19 (D. Kan. 1898).

All this, however, is beside the point. Although Whitney-Jefferson did become a national banking association before the effective date of the Louisiana statute, it would make no difference if it had not. What is at issue here is not the protection of Whitney-Jefferson as such, but rather the Comptroller's right to take action without state interference under a congressional mandate to create and charter federal instrumentalities to perform federal functions. It is respondents' assault on that right that has so far prevented the Comptroller from issuing his certificate and has kept the doors of an authorized national bank closed. The Comptroller, acting under the provisions of the National Bank Act and having made all investi-

gations and determinations required thereby, has correctly concluded that Whitney-Jefferson is entitled to conduct a national banking business. This conclusion is governed exclusively by federal law. Louisiana may not interfere with any state of the process by which the Comptroller authorizes and establishes this federal instrumentality.

CONCLUSION

For the reasons stated in our main brief and in this reply brief, the decision of the Court of Appeals should be reversed.

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